

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

With Affidavit

77-6148
77-6154

To be argued by
WILLIAM G. BALLAINE

United States Court of Appeals.

FOR THE SECOND CIRCUIT

Docket Nos. 77-6148, 6154

DUPONT GLORE FORGAN INCORPORATED, *et al.*,
Plaintiffs-Appellants,

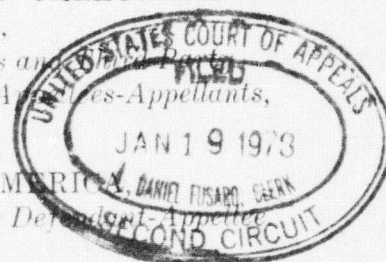
—against—

AMERICAN TELEPHONE AND TELEGRAPH
COMPANY, *et al.*,

Defendants and
Plaintiffs-Appellants,

—against—

UNITED STATES OF AMERICA,
Third-Party Defendant-Appellee



APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF THIRD-PARTY DEFENDANT-APPELLEE

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Treas. Reg. 42, §§ 130.77 and 130.78 (1942) are applicable to the present case pursuant to Treas. Reg. §§ 30.6415-1 and 49.0-4 (1977) and T.D. 6091, 1954-2 Cum. Bull. 47. As promulgated, Treas. Reg. 42, §§ 130.77 and 130.78 read as follows:

SEC. 130.77 CREDITS.

Every person required to pay tax, or to collect and pay tax, who overpays from his own funds, tax on a monthly return may, in cases where the overpayment was the result of a clerical or mechanical error, take credit for such overpayment against the tax due on a subsequent monthly return.

Every person required to collect tax, who makes a refund of any payment on which tax has been collected, may repay therewith the amount of tax collected on such payment and take credit for the amount so repaid against the tax due on a subsequent monthly return.

Any monthly return on which a credit is taken shall have attached thereto a sworn statement explaining the reason or reasons for claiming the credit, setting forth the amount of each kind of tax, and the portion thereof chargeable to each month's tax payment which is claimed to have been overpaid or overcollected, and stating whether a claim for refund with respect to any of the amounts involved has been filed, either with the collector or the Commissioner. To the extent that credit claimed on a return filed by a collecting agency is based on refunds or adjustments made with persons who paid the tax, the statement shall show that the collecting agency has refunded the tax to the persons involved or has obtained the written consent of such persons to the allowance of the credit. The written consent must be forwarded to the collector with the return on which the credit is taken.

A complete and detailed record of all credits taken shall be maintained and made available for inspection

by revenue officers for four years from the date of the return on which the credit appears.

SEC. 130.78 ABATEMENT OR REFUND OF ERRONEOUS OR ILLEGAL ASSESSMENTS OR COLLECTIONS.

A claim for abatement or refund of taxes alleged to have been erroneously or illegally assessed or paid (or of any penalties assessed or collected without authority) shall be prepared on Form 843 and presented to the collector of internal revenue for the district in which the amount claimed was assessed or paid. (See section 3313 of the [1939] Code.)

Where a collecting agency has erroneously or illegally overpaid from its own funds any tax, the collecting agency may claim a refund of such overpayments. In case a collecting agency has erroneously or illegally overcollected and overpaid any tax due, the collecting agency may claim a refund of the amount so overcollected and overpaid, but only if it is established by affidavit or otherwise as may be required (a) that the tax so overcollected and overpaid has been returned to the person from whom collected, or that the collecting agency has obtained the written consent of such person to the granting of the refund and (b) that no credits have been taken for the alleged overpayment in the manner provided for in section 130.77.

If a person who has paid tax to a collecting agency files a claim for refund in his own name, there should be attached to the claim the original receipts issued by the collecting agency showing payment of the tax involved and a sworn statement of the facts on which the claim for refund is based, and the affidavit on Form 843 must show that no repayment of the tax alleged to have been overpaid or any part thereof has been made to the claimant by the collecting agency and that he has not consented to the allowance of credit or refund to the collecting agency.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 77-6148, 6154

DUPONT GLORE FORGAN INCORPORATED, *et al.*

Plaintiffs-Appellants,

—against—

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, *et al.*,

Defendants and Third-Party

Plaintiffs-Appellees-Appellants,

—against—

UNITED STATES OF AMERICA,

Third-Party Defendant-Appellee.

BRIEF OF THIRD-PARTY DEFENDANT-APPELLEE

Preliminary Statement

Plaintiffs' appeal seeks, in part, reversal of the final judgment below insofar as it embodies the District Court's opinion, dated March 23, 1977, which granted defendants' motion for summary judgment dismissing counts II, IV and VI of the complaint (95a, 240a; Pl. Br. 1-2).^{*} These three counts were in the nature of tax refund claims, as they sought from defendants recovery of Federal communications excise taxes allegedly overcollected from members of plaintiffs' class (190a-218a; 428 F. Supp. 1297). In the opinion, filed by the Hon. Edward Wein-

^{*} References to the Appendix are made by giving the page number followed by "a". Where reference is made to one of the District Court's opinions, this brief also refers, where possible, to the opinion's reported citation.

feld, United States District Judge, the District Court also granted the Government's motion for summary judgment dismissing defendants' third-party complaint against the United States (215a-18a; 428 F. Supp. at 1307-08).

Defendants are cross-appealing from this dismissal, asserting that if counts II, IV and VI of plaintiffs' complaint were improperly dismissed, as plaintiffs claim, then defendants' third-party complaint should be reinstated insofar as it was based upon those counts of the complaint (241a-42a; Def. Br. 69-70). Defendants are not appealing from the dismissal of the third-party complaint insofar as it was based on counts I, III and V of plaintiffs' complaint (Def. Br. 69, n.*). In these three counts, plaintiffs alleged that they had paid excessive Federal communications excise taxes to defendants as a result of defendants' breach of statutory and common law duties (27a-40a, 63a).

Issues Presented by Defendants' Cross-Appeal

Did the District Court correctly hold that an action for refund of alleged overcollections of Federal communications excise taxes must be brought against the United States and, if not, should defendants' third-party complaint against the United States be reinstated insofar as it is based upon plaintiffs' tax refund claims?

Statement of the Case

Statement of Facts

For purposes of defendants' cross-appeal, the pertinent facts may be summarized briefly.

Plaintiffs commenced the present action on behalf of a class of users of Centrex telephone service (21a). The case was certified as a class action in 1975 (219a-39a; 69

F.R.D. 481). Plaintiffs' complaint alleged eight counts; counts II, IV and VI of the complaint consisted of claims that defendants had overcollected Federal communications excise taxes for more than six years, beginning in 1966 (21a-46a). Although plaintiffs' tax claims were directed solely against defendants, the excise taxes embraced by these claims had not been retained by defendants. Instead, defendants, acting as statutory collectors, had paid these taxes over to the United States (288a, 299a-300a, 303a). The amounts allegedly overcollected were originally estimated by plaintiffs at \$50 million (43a-44a).*

According to plaintiffs' counsel, "some", but clearly not all, members of plaintiffs' class have filed administrative refund claims with the Internal Revenue Service ("IRS") covering the same taxes sought to be recovered against defendants (299a-300a; Pl. Br. 99, n. 30). The record does not indicate when these claims were filed, but the claim of at least one named plaintiff, Monsanto Company, was not filed until at least three weeks after plaintiffs' class action had been initiated (18a-46a; 285a-87a).

In response to plaintiffs' assertion of tax refund claims in counts II, IV and VI of the complaint, defendants took two steps. First, within two months of the date of plaintiffs' complaint, all defendants but one prepared and filed administrative refund claims with the IRS covering all of the taxes in issue (272a-73a). The administrative claims referred to plaintiffs' action and alleged that although claimants did not believe any taxes had been overcollected, any finding of overcollection would entitle the claimants to a refund. Each administrative claim simply estimated the amount to be refunded

* Plaintiffs' brief on appeal estimates the figure at \$30 to \$50 million (Pl. Br. 80, n. 25).

as "\$1,000 or such amount as is legally refundable with interest thereon as provided by law" (271a-73a, 276a-79a).

The administrative claims were not passed upon by the IRS within six months after filing, and thereafter, defendants proceeded with step two. They filed and served a third-party complaint against the United States (61a-64a). The third-party complaint, dated October 1, 1974, alleged that if defendants were liable to plaintiffs on any of the first six counts of the complaint, the United States would be liable to defendants for the amount of plaintiffs' recovery (63a-64a).

As set forth in their complaint, plaintiffs' tax refund claim was that from as early as 1966 plaintiffs paid communications excise taxes on a portion of their Centrex telephone service that would have been exempt from tax under 26 U.S.C. § 4252(d) had this portion of the service been separately charged to members of the class. Plaintiffs charged that the twenty-three defendant operating companies had maintained a separation of the pertinent charges on their books but did not reflect this separation in their bills to customers. Plaintiffs alleged, however, that under Revenue Ruling 69-152, 1969-1 Cum. Bull. 289, the alleged separation on defendants' books was sufficient to entitle them to claim the section 4252(d) exemption benefits (27a-32a, 36a-40a). Defendants have denied the material allegations of this tax refund claim (51a, 54a-56a).

Proceedings Below

For purposes of the cross-appeal, the following are the pertinent proceedings in the District Court.

In December, 1977, the United States moved to dismiss defendants' third-party complaint against the Government. The Government argued that (1) as respects

defendants' third-party claim concerning counts II, IV and VI of the complaint, defendants could not assert jurisdiction under 28 U.S.C. § 1346(a)(1), which governs all tax refund actions against the United States, because prior to commencing their refund suit, they were required either to have repaid the taxes in issue to all of plaintiffs' class members or to have obtained consents from each class member permitting the allowance of tax refunds in defendants' favor;* (2) even if defendants were entitled to proceed with their tax refund suit under 28 U.S.C. § 1346(a)(1), defendants' claims were limited to those not time-barred by 26 U.S.C. § 6511(a); and (3) as respects defendants' third-party claim concerning counts I, III and V of the complaint, there were no statutory bases for jurisdiction against the United States (267a-79a).

Immediately following the Government's motion, defendants moved to dismiss the tax refund claims set forth in counts II, IV and VI of plaintiffs' complaint (280a-292a). Defendants claimed that plaintiffs could assert these refund claims only against the United States. The Government joined in defendants' motion.

These two motions were decided in the District Court's opinion, dated March 23, 1977 (190a-218a; 428 F. Supp. 1297). This opinion is the crux of the present appeal insofar as the interests of the United States are concerned.

The District Court's Opinion Dismissing the Third-Party Complaint and Counts II, IV and VI of Plaintiffs' Complaint

Judge Weinfeld held that the tax refund claims in counts II, IV and VI could be asserted only against the

* In answers to interrogatories, the three named plaintiffs stated that they had not given their consent to defendants' refund claims (274a).

United States, not against defendants (214a-215a; 428 F. Supp. at 1306). Accordingly, the District Court granted defendants' motion for partial summary judgment as respects those counts of plaintiffs' complaint (215a; 428 F. Supp. at 1307). The District Court also held that there was no jurisdictional basis for defendants' third-party complaint against the United States insofar as it related to counts I, III and V of plaintiffs' complaint. Given his decision granting defendants' motion for partial summary judgment, Judge Weinfeld dismissed the third-party complaint in its entirety without having to decide the Government's further contention that there was no jurisdiction over defendants' third-party complaint insofar as it related to counts II, IV and VI. (215a-18a; 428 F. Supp. at 1307-08).

As respects the decision to grant defendants' motion for partial summary judgment against plaintiffs, the District Court based its legal conclusion first upon 26 U.S.C. § 7422(a) and (f) (1), which provides:

(a) *No suit prior to filing claim for refund.*

No suit or proceeding shall be maintained in any court for the recovery of any inter revenue tax alleged to have been erroneously or illegally assessed or collected . . . until a claim for refund or credit has been filed with the Secretary [of the Treasury] or his delegate. . . .

* * *

(f) *Limitation on right of action for refund.*

(1) *General Rule.*

A suit or proceeding referred to in subsection (a) may be maintained only against the United States and not against any officer or employee of the United States. . . .

The District Court concluded that these provisions were "unambiguous" in requiring that all tax refund suits be

brought in compliance with the requisite administrative procedures and only against the United States. The District Court added that nothing in the pertinent legislative history revealed that Congress ever intended that a tax refund suit could be brought against private collecting agents, rather than the Government (198a-20a; 428 F. Supp. at 1301-02).

Not limiting its analysis to the plain language of section 7422, the District Court noted that in every case involving a suit by Federal excise taxpayers against tax collecting agents such as defendants, taxpayers' action has been dismissed. Judge Weinfeld added that his result also comported with analagous state law cases and with accepted principles of agency law (201a-02a at n.21; 428 F. Supp. at 1302-03, n.21).

The District Court emphasized that its conclusion was consistent with, if not mandated by, "the harmony of our carefully structured twentieth century system of tax litigation [quoting *Flora v. United States*, 362 U.S. 145, 176 (1960)]" (202a; 428 F. Supp. at 1303). Judge Weinfeld pointed out that if plaintiffs were permitted to proceed directly against the collecting agents and defendants in turn were permitted to recover through a third-party claim from the Government, plaintiff-taxpayers would succeed in avoiding the strict procedural requirements for obtaining Federal tax refunds:

In effect they will have obtained a refund of taxes from the government without giving the Internal Revenue Service an opportunity to consider their claims administratively, and without being subject to the statute of limitations imposed by the Code. This would clearly negate the Congressional purpose in enacting the refund provisions of the Code.

(204a; 428 F. Supp. at 1303) (footnote omitted). On the other hand, Judge Weinfeld added, if the Government is not a party to the tax refund suit against a collecting

agent "the problems are just as complex" (204a; 428 F. Supp. at 1303). A court then would be forced to adjudicate complex questions without the benefit of participation by the IRS, despite the Government's vital interest in collecting taxes that are due and assuring that refunds are made only to those entitled to them (204a-05a; 428 F. Supp. at 1303-04).

The District Court considered and rejected plaintiffs' argument that, despite the carefully-structured statutory provisions governing tax refund actions, plaintiffs' refund suit against defendants was nonetheless authorized by 26 U.S.C. § 6415(c). Section 6415 sets forth a statutory mechanism for permitting refunds or credit adjustments to statutory collecting agents who have collected certain types of Federal excise taxes, including communications excise taxes.* Subsection (c) thereof provides that in the

At present, Section 6415 provides:

§ 6415. *Credits or refunds to persons who collected certain taxes.*

(a) *Allowance of credits or refunds.*

Credits or refund of any overpayment of tax imposed by section 4251, 4261, or 4271 may be allowed to the person who collected the tax and paid it to the Secretary or his delegate if such person establishes, under such regulations as the Secretary or his delegate may prescribe, that he has repaid the amount of such tax to the person from whom he collected it, or obtains the consent of such person to the allowance of such credit or refund.

(b) *Credit on returns.*

Any person entitled to a refund of tax imposed by section 4251, 4261, or 4271 paid, or collected and paid, to the Secretary or his delegate by him may, instead of filing a claim for refund, take credit therefor against taxes imposed by such section due upon any subsequent return.

(c) *Refund of overcollections.*

In case any person required under section 4251, 4261, or 4271 to collect any tax shall make an over-collection of such tax, such person shall, upon proper application, refund such over-collection to the person entitled thereto.

(d) *Refund of taxable payment.*

Any person making a refund of any payment on which tax imposed by section 4251, 4261, or 4271 has been collected may repay therewith the amount of tax collected on such payment.

case of an "overcollection" the collecting agent shall "upon proper application" refund the overcollected taxes to the taxpayer. 26 U.S.C. § 6415(c). Concluding that section 6415(c) does not, on its face, authorize taxpayers to assert a cause of action against defendants without their having complied with the Government's administrative refund requirements, the District Court noted that plaintiffs had offered no reason why Congress would have singled out transportation and communications excise taxes as a glaring exception to the usual statutory requirements (205a-06a; 428 F. Supp. at 1304).*

In order to determine the nature of a taxpayer's actual rights under section 6415(c), the District Court reviewed section 6415, its legislative history, the statutory predecessors of section 6415, and pertinent Treasury Regulations. Judge Weinfeld noted that both under prior and present law, a statutory collector is authorized to take a tax credit on a subsequent tax return if and when there has been an "overcollection" due to "clerical or mechanical errors"; when, on the other hand, it is alleged that taxes have been "erroneously or illegally assessed or paid", the collector must, consistent with the IRS's usual administrative scheme, file a formal administrative refund claim. Judge Weinfeld concluded, therefore, that section 6415(c) simply meant that when, because of a clerical or mechanical error, the collecting agent is indisputably entitled to take a credit for "overcollected" taxes, the taxpayer is entitled to apply to the collecting agent for a refund of the concededly overcollected amount. Judge Weinfeld rejected the argument that section 6415(c) had the far-reaching effect of authorizing a taxpayer

* The District Court pointed out that there are other situations in which Federal taxes are collected by third parties acting as collecting agents for the Government, citing as the "best-known" example, the withholding of Federal income and Social Security taxes under 26 U.S.C. §§ 3102, 3402(206a and n. 29; 428 F. Supp. at 1304 and n. 29).

to assert "major and disputed" claims to a tax refund without following the Government's administrative refund procedures (205a-210a; 428 F. Supp. at 1304-05).

ARGUMENT

The District Court Correctly Dismissed The Third-Party Complaint Insofar as it Related To Counts II, IV and VI of the Complaint.

The Government has described in detail the District Court's reasoning in dismissing counts II, IV and VI of plaintiffs' complaint for a simple reason. Judge Weinfeld's thorough opinion persuasively explains why plaintiffs may not sue defendants for the return of \$30-50 million in excise taxes which they allege were illegally overcollected.*

On this appeal plaintiffs dispute the District Court's analysis for two reasons. They argue first that 26 U.S.C. § 6415 must be construed to constitute "specific authorization" for their tax refund suit. *See* Pl. Br. 95. They do not—and cannot—contend that this provision unambiguously authorizes a tax refund suit against statutory collectors. *See* Pl. Br. 96. Moreover, they admit that Section 1715(d)(2) of the Internal Revenue Code of 1939, 53 Stat. 192,** a statutory prede-

* In its opinion, the District Court cited both federal and state cases which are analogous to plaintiffs' situation (201a-02a and n. 21; 428 F. Supp. at 1302 and n. 21). All supported the District Court's decision to reject plaintiffs' claimed right to bring a refund suit against the statutory collector. We respectfully reter the Court to these decisions, which will not be repeated herein. *See also* Def. Br. 65-66 and n.**.

** References to the Internal Revenue Code of 1939 will hereafter be to the "1939 Code." References to the Internal Revenue Code of 1954 will be to the "Code," the "present Code," or the "1954 Code." The first time a section of the 1939 Code is referred to herein, we will provide a parallel citation to the Statutes at Large. Thereafter, the brief will simply cite to the section as embodied in the 1939 Code.

cessor of section 6415(c), only entitled a taxpayer to apply to the statutory collector for a tax refund when there was a conceded overcollection because of clerical or mechanical error—certainly not plaintiffs' situation here (Pl. Br. 96-97).

Plaintiffs argue, however, that Congress must be "assumed" to have made a substantial change in this law in 1954 because section 6415(c), as enacted in the 1954 Code, deleted what plaintiffs describe as critical "gearing language"—the provision in Section 1715(d) (2) of the 1939 Code which stated that the collector was entitled to take a credit on a subsequent return (Pl. Br. 96-97).^{*} This argument seems totally without merit since the "gearing language" which plaintiffs say was *deleted* in the 1954 Code in fact appears in subsection (b) of section 6415;^{**} and a review of the background behind enactment of section 6415 only confirms that plaintiffs' statutory argument, raised for the first time of this appeal, must be rejected.

As enacted, section 6415 set forth credit and refund procedures governing a variety of excise taxes collected on behalf of the United States by private collecting agents, including taxes on telephone service, on safe deposit boxes and on admissions and club dues. 1954 Code, § 6415, 68A Stat. 798. Section 6415 thus reflected a consolidation of separate credit and refund provisions which had ap-

^{*} This deleted "gearing language" stated simply that "the person making such overpayment may take credit therefor against taxes due upon any return . . ." 1939 Code, § 1715(d) (2).

^{**} Section 6415(b) presently reads:

(b) Credit on returns.

Any person entitled to a refund of tax imposed by section 4251, 4261, or 4271 paid, or collected and paid to the Secretary or his delegate by him may, instead of filing a claim for refund, take credit therefor against taxes imposed by such section due upon any subsequent return.

peared in the 1939 Code for each of these classes of tax—under the 1939 Code, Section 1715(d) had governed the admissions and dues tax; Section 1854 of the 1939 Code, 53 Stat. 206, had governed the safe-deposit box tax; and Section 3471(a)-(c) of the 1939 Code, as amended, 53 Stat. 423, amended by the Revenue Act of 1941, ch. 42, § 554(d), 55 Stat. 772 and by the Revenue Act of 1942, ch. 619, § 620(b), 56 Stat. 980, had governed the telephone tax. All *three* provisions indicated that a statutory collector could claim a credit on a subsequent return, a right which, by regulations, was limited to adjustments for clerical or mechanical error. 1939 Code, §§ 1715(d)(2), 1854 and 3471(b); Treas. Reg. 42, Art. 51, 52 (1932) and Treas. Reg. 42, §§ 130.77-130.78 (1942). (The latter regulations are set forth *supra* at v-vi).

A comparison of section 6415, as enacted, and the three 1939 Code provisions which it superceded demonstrates that Congress simply joined together the material provisions of the three sections of the 1939 Code just described. Thus, Sections 1854 and 3471 of the 1939 Code are almost identical to subsections (a), (b) and (d) of section 6415 as enacted in the 1954 Code; and subsection (c) of section 6415 closely resembles Section 1715(d)(2) of the 1939 Code except insofar as it deletes the language authorizing the collecting agent to claim a credit. The deletion of this language in subsection (c) of section 6415 obviously was simply the result of editing, because the very same language, having appeared in Sections 1854 and 3471 of the 1939 Code, was included by Congress in subsection (b) of section 6415.

In short, Congress did not delete plaintiffs' so-called "gearing language" at all. It simply moved the language into a separate subsection as part of the process of consolidating into one four-part section what had been treated in three separate sections of the 1939 Code. There is no basis for concluding that in 1954 Congress intended to enlarge the taxpayer's limited right under Section 1715(d) of the 1939 Code; and plaintiffs' admission that

Section 1715(d) had permitted the taxpayer to apply to the statutory collector for a refund *only* when there had been a clerical or mechanical error defeats plaintiffs' present statutory contention.

Our construction of section 6415(c) is supported by the legislative history relating to section 6415. Plaintiffs say that there is "nothing" in this history that would "overcome the natural assumption" that Congress intended a substantial change (Pl. Br. 97). We strongly disagree. In the legislative history discussing the 1954 Code, Congress routinely indicated when changes were being made from the 1939 Code. *See e.g.*, H.R. Rep. No. 1337, 83d Cong., 2d Sess. (1954), *reprinted in* [1954] U.S. Code Cong. & Ad. News 4017, 4560; S. Rep. No. 1622, 83d Cong., 2d Sess. (1954), *reprinted in* [1954] U.S. Cong. & Ad. News 4621, 5231. Thus, Congress' failure to say anything remotely suggestive of the change plaintiffs claim is evidence that no such change was either intended or effectuated.*

* In addition to expressly stating when changes were being made from the 1939 Code, the House and Senate Reports generally stated, where applicable, when there was "no material change from existing law." Although this particular phrase is not included in the discussion of section 6415, we nonetheless submit that where Congress is dealing with tax matters on which there is existing law, Congressional silence in the legislative history demonstrates that Congress did not intend to disrupt the continuity of such law.

Consistent with our view, we note that the Treasury Regulations governing refunds or credits of communications taxes are the same regulations that controlled some of section 6415's statutory predecessors. *See* Treas. Reg. 42, §§ 130.77-130.78 (1942) (set forth *supra* at v-vi). These regulations are the very regulations to which plaintiffs refer (Pl. Br. 97) in stating that prior to the 1954 Code the taxpayer's proper application for a refund from the private collector presumed a clerical or a mechanical error, not a disputed claim.

Plaintiffs appear to recognize that their sweeping interpretation of section 6415(c) must fail unless it can be reconciled with the Government's comprehensive scheme for administering tax refund claims. The best plaintiffs can do, however, is assert that their interpretation will cause "no great wrench" to the IRS's administrative foundations, since suits based on section 6415(c) are of "a very limited kind." P1. Br. 98-99. We do not see how plaintiffs can seriously propose this argument given their own lawsuit, which involves \$30-50 million in tax refund claims on behalf of more than 1,000 telephone subscribers, covers more than a six-year period, and puts in issue the nature of the bookkeeping records of twenty-three telephone operating companies across the United States.

Plaintiffs' sought-for interpretation of section 6415(c) most assuredly would effect a "great wrench" on the administration of the revenue laws. These laws provided all of the plaintiffs with a viable means for asserting their tax refund claims directly against the United States pursuant to 28 U.S.C. § 1346(a)(1); see e.g., *Pahoulis v. United States*, 242 F.2d 345 (3d Cir. 1957), *rev'd*, 143 F. Supp. 913 (W.D. Pa. 1956); but each plaintiff seeking to prosecute such an action would have been required first to file timely administrative refund claims and to exhaust administrative remedies. See 26 U.S.C. §§ 6415 and 7422; Treas. Reg. 42, § 130.78 (1942); and Rev. Rul. 54-328, 1954-2 Cum. Bull. 378. Plaintiffs would not have been permitted to assert tax refund claims against the United States in a class action embracing taxpayers that had not exhausted their administrative remedies. See, e.g., *Lipsett v. United States*, 37 F.R.D. 549 (S.D.N.Y. 1965), *appeal dismissed*, 359 F.2d 956 (2d Cir. 1966); *Agron v. Illinois Bell Telephone Co.*, 325 F. Supp. 487 (N.D. Ill. 1970), *aff'd in part*, 449 F.2d 906 (7th Cir. 1971), *cert. denied*, 405 U.S. 954 (1972); *McConnell v. United States*, 295 F. Supp. 605 (E.D. Tenn. 1969); *Harkins v. United States*, 66-2 USTC ¶ 9543 (E.D. Okla. June 27, 1966), *aff'd on other grounds*, 375 F.2d 239 (10th Cir. 1967).

Assuming defendants may properly assert a third-party claim against the United States,* plaintiffs' alleged

* In fact, defendants cannot properly assert their third-party claim against the United States because of defendants' failure to comply with administrative refund requirements. *See generally United States v. Felt & Tarrant Manufacturing Co.*, 283 U.S. 269, 272 (1931); *Mondschein v. United States*, 338 F. Supp. 786, 788 (E.D.N.Y. 1971), *aff'd*, 469 F.2d 1394 (2d Cir. 1973). Defendants, although they filed administrative claims, could not submit evidence that they had either repaid the excise taxes in issue or obtained the consent of all plaintiffs to their refund suit (273a-74a) as they were required to do pursuant to 26 U.S.C. § 6415(a) and Treas. Reg. 42, § 130.78 (1942), made applicable by Treas. Reg. §§ 301.6415-1 and 49.0-4 (1977) and T.D. 6091, 1954-2 Cum. Bull. 47. *See, e.g., Epstein v. United States*, 357 F.2d 928, 937 (Ct. Cl. 1966); *United States v. Spokane Rodeo, Inc.* 254 F.2d 377, 378-79 (9th Cir. 1958). Proof of repayment or consent may be demonstrated by a collector subsequent to the formal filing of an administrative claim, *see Revenue Ruling 69-508*, 1969-2 Cum. Bull. 262; but it must in any event be established prior to the commencement of a tax refund suit under 28 U.S.C. § 1346(a)(1); *see Anderson Company v. United States*, 447 F.2d 41, 47-48 (7th Cir. 1971); *West v. United States*, 397 F.2d 381, 382-83 (7th Cir. 1968) (and cases cited therein); *Sharp & Dohme, Inc. v. United States*, 144 F.2d 456, 458-59 (3d Cir. 1943); but *see contra International Business Machines Corp. v. United States* 343 F.2d 914, 918-19 (Ct. Cl. 1965). In this regard, we contend that the *International Business Machines Corp.* reasoning should not be followed here. To do so would vitiate the administrative process since the IRS cannot grant an administrative refund if the collector never establishes repayment or consent.

In the District Court, defendants disputed our position by stating that under 26 U.S.C. § 6415(b) they could take a credit on "any subsequent return." Even if that were true, it is irrelevant to defendants' right to proceed with this *refund* action. Moreover, Treas. Reg. 42 § 130.77 (1942), governing credits, requires the very same proof of repayment or consent that is required under Treas. Reg. 42, § 130.78(1942). Finally, defendants argue (Def. Br. 70, n.*) that they may proceed against the United States by reason of 28 U.S.C. § 2006. On its face, section 2006 does not confer jurisdiction over the United States. Moreover, the

[Footnote continued on following page]

right under section 6415(c) to sue defendants, not the United States would permit plaintiffs to flaunt these strict administrative requirements, vitiating the Government's commitment to its carefully-structured administrative refund scheme. The IRS will have had no meaningful opportunity to investigate and evaluate plaintiffs' multi-million dollar claims, a procedure aimed at achieving an administrative disposition which might obviate adjudication in the courts. We submit Congress would not have undercut the administrative process in this fashion and thereby permitted an increase in Federal court suits without having made some mention of its intentions in pertinent legislative history.

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section plainly is designed to protect the very same "collectors" who are protected by 26 U.S.C. § 7422(f) (1) (quoted and discussed *supra* at 6-7 and *infra* at 20). See generally 10 Mertens, Law of Federal Income Taxation §§ 58A.28 and 58.28a (rev. 1976). Defendants have argued, correctly we believe, that 26 U.S.C. § 7422(f) (1) protects them, as statutory collectors, from plaintiffs' tax refund suit. Should this Court reject the argument, however, it would necessarily follow that defendants are not "collectors" covered by 28 U.S.C. § 2006.

For a full exposition of the parties' arguments on this jurisdictional issue, we respectfully refer the Court to the Memorandum of United States in Support of Summary Judgment Motion against Defendants' Third-Party Complaint, dated December 14, 1976, to Defendants' Memorandum of Law in Opposition to Government's Motion for Summary Judgment, dated January 7, 1977 and to the Reply Memorandum of the United States in Support of a Motion to Dismiss Defendants' Third-Party Complaint, filed January 19, 1977.

Obviously, the Government's jurisdictional contention places defendants in an untenable position. However, as we argue in this brief, defendants are in this position only because plaintiffs have incorrectly contended that they may assert their refund claims against defendants, rather than the United States. Proper resolution of this matter requires rejection of plaintiffs' claimed right to bring a tax refund suit against defendants.

Assuming the validity of defendants' third-party claim against the United States, plaintiffs' interpretation of section 6415(c) causes a second "wrenching" effect to which they make no reference: the effect on the public Treasury. As already indicated, had plaintiffs asserted their tax claims directly against the United States, each member of the class clearly would have had to file administrative refund claims, 26 U.S.C. § 7422(a) (*see supra* at 14); and they would have had to do so in compliance with 26 U.S.C. § 6511(a), which mandates that a claim for each tax quarter involved be submitted within three years from the date the pertinent excise tax return was filed by defendants. 26 U.S.C. § 6511(a); *see* Revenue Ruling 60-58, 1960-1 Cum. Bull. 638. Thus, it appears that those plaintiffs who did file administrative claims, but not until plaintiffs' lawsuit was filed in June, 1973 (*see* 285a-87a), may well be barred under section 6511(a) from asserting their refund claims against the United States for every tax period from 1966 at least through the first tax quarter of 1970 (*see* 270a-71a, 293a-94a). *See* Treas. Reg., Part 49, Subpart G (1977) (indicating when returns must be filed and excise taxes paid by the collector). Moreover, it appears that those members of plaintiffs' class who have not filed administrative claims at all now would be time-barred from making any claim against the United States, since the last tax year in issue is 1972. Yet, armed with their proposed interpretation of section 6415(c), plaintiffs claim the right to avoid the proscriptive effect of sections 6511(a) and 7422(a) even though the result could be recovery from the United States of taxes allegedly overcollected as far back as 1966.* The potential adverse effect on the public Treasury is obvious.

* In fact, the Government contends that 26 U.S.C. § 6511(a) limits defendants' right of recovery, if any, under their third-party complaint in this action. Thus, in no event can defendants recover taxes covered by administrative claims which were filed more than three years from the dates on which defendants had been required to file the excise tax returns to which the administrative claims relate (*see* 267a-79a). 26 U.S.C. § 6511(a); *see*

[Footnote continued on following page]

The wrenching effect of plaintiffs' present position is not relieved even if defendants cannot successfully assert a third-party claim against the United States. In that case, defendants would be left to shoulder the potential exposure to plaintiffs' refund claims simply because of their actions as statutory collectors on behalf of the United States and even though they have paid over all taxes collected. Moreover, as the District Court noted, if the United States is not a party the Government cannot satisfy its substantial interest in resolving claims arising under the Internal Revenue laws and in assuring that taxes are refunded only to those entitled to them (*see* 204a-205a; 428 F. Supp. at 1303-04).

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Revenue Ruling 69-508, 1969-2 Cum. Bull. 262; *cf.* Revenue Ruling 58-563, 1958-2 Cum. Bull. 892. Defendants contend that section 6511(a) does not apply because it only refers to claims for taxes for which a "taxpayer" (not a "statutory collector") is required to file a return, adding that under their view of 26 U.S.C. § 6415(b), defendants may be able to claim a credit for the taxes in dispute on "any subsequent return." However, if defendants are entitled to proceed as taxpayers against the United States under 28 U.S.C. § 1346(a)(1), *see Phillips v. United States*, 346 F.2d 999, 1000 (2d Cir. 1965); *cf. Reams v. Vroom-Fehn Printing Co.*, 140 F.2d 237, 240 (6th Cir. 1944); *John J. Casale, Inc. v. Pedrick*, 72 F. Supp. 848, 850 (S.D.N.Y. 1947), they must be governed by the limitations period set forth in section 6511(a). *See, e.g., Hampton v. United States*, 513 F.2d 1234 (Ct. Cl. 1975) (and cases cited therein); *cf., United States v. Chicago Golf Club*, 84 F.2d 914, 916-18 (7th Cir. 1936).

Defendants urge that the Government's application of section 6511(a) against defendants creates an untenable result because it leaves defendants exposed to plaintiffs' claims for the time-barred years. As with the Government's other jurisdictional argument (discussed *supra* at 15-16), we agree that the application of section 6511(a) places defendants in an untenable position and submit that this fact only underscores our position that plaintiffs' effort to sue defendants, not the United States, must be rejected. Congress could not have intended to place statutory collectors in the position defendants now find themselves without saying a word about their intentions in legislative history.

Plaintiffs suggest that there is "an element of unfairness to the taxpayers in holding them to suits against the Government" (Pl. Br. 99). They then posit the situation where defendants may "negligently or without probable cause and for selfish motives" conceal a taxpayer's right to an exemption (Pl. Br. 99). The District Court, however, fully disposed of this purported fairness claim:

. . . Counts II, IV and VI of the complaint are pleaded merely as claims for refund of overcollected taxes. They contain no allegation of lack of probable cause to collect the taxes, nor of any concealment of facts from the plaintiffs. Thus, the short answer to plaintiffs' argument is that, whatever its merits, it is not relevant to the claim upon which plaintiffs seek recovery from the defendants.

(211a; 428 F. Supp. at 1306) (footnote omitted).

In addition to relying upon their reading of section 6415(c), plaintiffs urge that 26 U.S.C. § 7422 should not be construed as barring plaintiffs' suit against a private tax collector, asserting that section 7422(a) only covers refund claims against the Government (*see* Pl. Br. 97-98). Section 7422(a), however, states in broad terms that "no suit . . . shall be maintained in any court *for the recovery of any Internal Revenue tax alleged to have been erroneously or illegally assessed or collected* [emphasis added]" unless an administrative refund claim has been filed. 26 U.S.C. § 7422(a).^{*} It does not say no suit shall be maintained "against the United States" unless an administrative claim has been filed and has never been so interpreted. Thus, both section 7422(a)

^{*} This provision dovetails with Treas. Reg. 42, §§ 130.77-130.78 (1942). The regulations permit a crediting in the case of an "overcollection" due to mechanical or clerical errors; but they require the filing of a formal administrative refund claim with respect to a tax "alleged to have been erroneously or illegally assessed or paid." Plaintiffs' claim obviously falls within this latter category.

and its predecessor section under the 1939 Code have been consistently applied not only to tax refund suits against the United States, but also to refund suits directed against an individual Government employee. See e.g., *United States v. Felt & Tarrant Manufacturing Co.*, *supra*, 283 U.S. 269; *Ronald Press Co. v. Shea*, 114 F.2d 237 (5d Cir. 1940). Given the substantial policy considerations already discussed, section 7422(a) should be given its broad, plain meaning and applied to plaintiffs' tax refund claims.

Finally, plaintiffs dispute the significance of 26 U.S.C. § 7422(f)(1), which states that a tax refund suit "may be maintained only against the United States. . . ." 26 U.S.C. § 7422(f)(1). Although taxpayers would have this provision read narrowly, they can cite no legal authority to support their proposed construction. Moreover, as with section 7422(a), their proposed construction is belied by the broad language of section 7422(f)(1), by case law, by legislative history and by the Government's overall tax refund structure, which is designed to channel all refund suits through the IRS's administrative processes. (199a-203a; 428 F. Supp. at 1302-03; see Def. Br. 64-66).

Plaintiffs' position on this appeal requires an interpretation of both section 6415(c) and section 7422(a) and (f)(1) which either (i) vitiates the Government's well-rooted tax refund structure, resulting in a potential invasion of the public fisc which could not have been achieved had plaintiffs adhered to this structure; or (ii) subjects collecting agents to potential financial exposure simply because they are performing their duties as statutory collectors under the Code.

Plaintiffs do not cite a single case to support their position. They do not cite legislative history which specifically speaks in their favor. They do not cite any Treasury Regulations supporting their view. Instead,

they rely almost exclusively upon an inconsequential change in section 6415(c). This argument cannot be permitted to suffice. Plaintiffs' efforts to breach the integrity of the taxing structure should be rejected.

In summary, the Government contends that defendants' third-party complaint, insofar as it related to plaintiffs' tax refund claims, could have been dismissed by the District Court in whole, or in part, due to jurisdictional defects (*see supra* at 15-16, n.* and 17-18, n.*). But the most proper resolution of this matter was the one adopted by Judge Weinfeld below—dismissal of plaintiffs' tax refund claims against the defendants on the ground that these claims must be asserted directly against the United States.

CONC

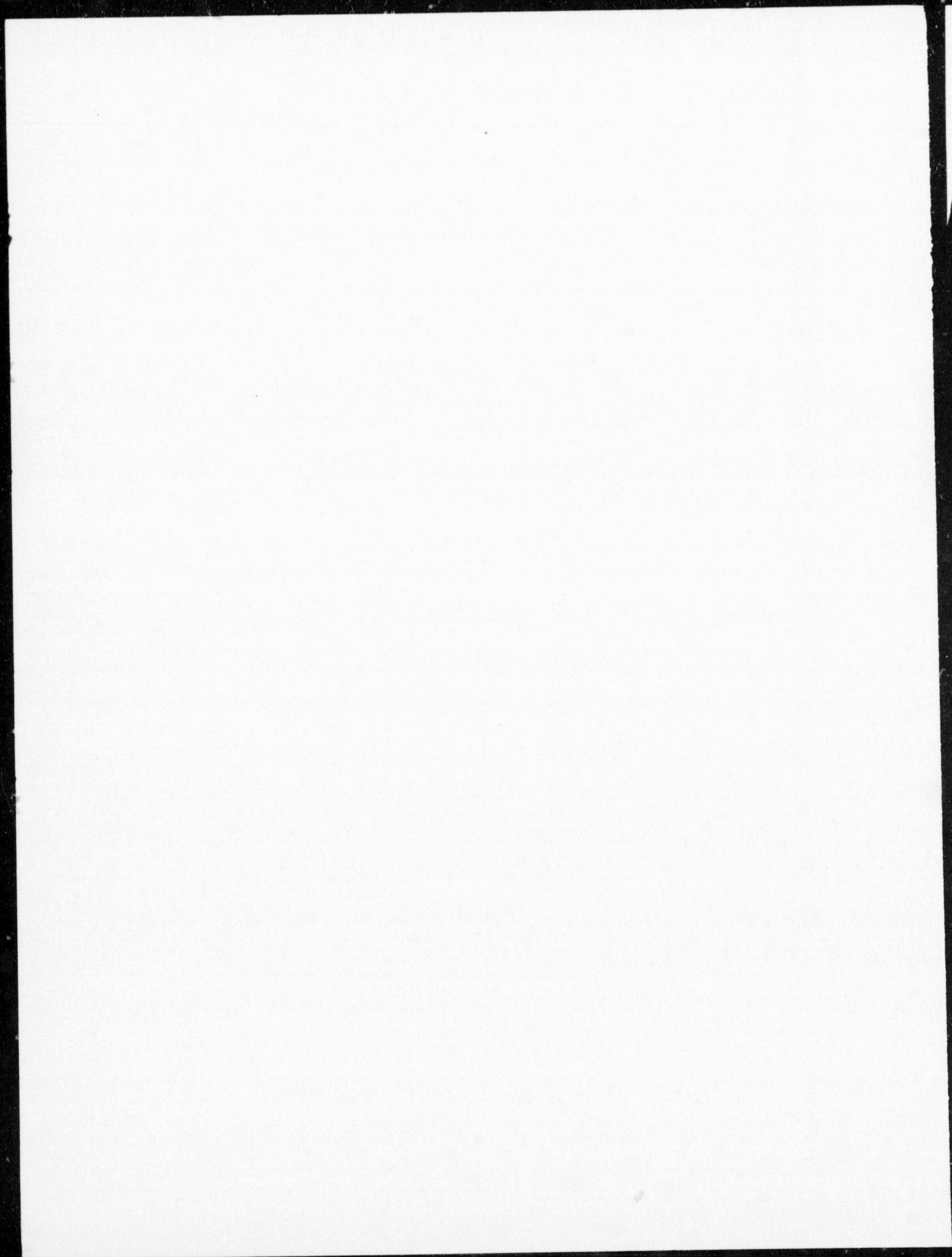
By reason of the foregoing, the judgment of the United States District Court for the Southern District of New York should be affirmed insofar as it dismissed defendants' third-party claim against the United States.

Dated: New York, New York
January 17, 1978

Respectfully submitted,

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AFFIDAVIT OF MAILING

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deposes and says that he is employed in the Office of the
United States Attorney for the Southern District of New York.

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he served ~~a copy~~ of the

17th day of January 19 78

within appellee's (govt) brief

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William G. Ballaine

17th day of January, 19 78

Pauline P. Ford